

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: November 13, 2003

Resolution No. L-308

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF PORTIONS OF SUPPLEMENTAL DIRECT ACCESS IMPLEMENTATION ACTIVITY REPORTS SUBMITTED TO THE ENERGY DIVISION BY SOUTHERN CALIFORNIA EDISON, PACIFIC GAS AND ELECTRIC AND SAN DIEGO GAS AND ELECTRIC CONCERNING POWERSOURCE CORPORATION PURSUANT TO SUBPOENA AND REQUEST FOR AUTHORIZATION TO DISCLOSE BY ROBERT JASPERSE, ESQ., ON BEHALF OF THE UNITED STATES DEPARTMENT OF JUSTICE CONSUMER LITIGATION DIVISION.

BACKGROUND

On July 31, 2003, records concerning Powersource Corporation were subpoenaed by the United States Department of Justice, Consumer Litigation Division (US DOJ). Specifically, the US DOJ requested that the Commission provide confidential direct access service request reports filed by San Diego Gas & Electric, Pacific Gas and Electric Company, and Southern California Edison showing the number of electricity customer accounts served by a defunct energy service provider ("ESP"), Powersource Corporation, between 1998 and the present. Direct access service requests are submitted by electric service providers ("ESP") to a public utility in order to initiate a transfer of customer accounts from the utility to the electric service provider.¹

Legal Division staff provided the US DOJ with the portions of the direct access service request reports that reflected service change requests submitted by Powersource

¹ In a subpoena received by the Commission on August 18, 2003 (STR#886), the Commission was requested to provide the US DOJ with other records concerning Powersource Corporation, such as the electric service provider registration documents and documents showing the current regulatory status of Powersource Corporation. These documents, which are available to the public, were provided.

Corporation,² subject to a confidentiality agreement that the US DOJ would disclose the confidential information to the minimal extent necessary to implement its regulatory and law enforcement responsibilities, and would seek the Commission's consent before disclosing the documents to the general public. On November 4, 2003, the US DOJ indicated that it was requesting authority to disclose the direct access service request reports in prosecuting Powersource Corporation in United States v. Thomas P. Norton et. al, Case No. 03-CR-20425, which is scheduled to take place on December 1, 2003 in the Southern District of Florida. The US DOJ will use the information concerning Powersource to show that Powersource Corporation misrepresented to investors that it had a vastly greater number of California customers than was in fact the case. The direct access service request report information at issue here provides essential evidence regarding the actual number of Powersource Corporation's California customer accounts during the past several years.

Agreements between utilities and electric service providers generally include a provision stating that the utility will not on its own disclose direct access service request information, and utilities generally submit the required direct access service request reports to the Commission subject to a request for confidential treatment. The agreements between electric service providers and utilities also generally recognize, however, that disclosure may be necessary for regulatory or law enforcement purposes.

It is not entirely clear why electric service providers are sensitive to the disclosure of information concerning the number of their customer accounts, although it may be inferred that at least some companies would be sensitive to the public revelation that they actually have very few customers. New potential customers may be reluctant to sign up with an electric service provider with few customers. Whether the public interest in fostering potential competition between electric service providers and utilities creates a true public interest in refraining from disclosing customer numbers is somewhat of an open question, since one could easily find a countervailing public interest in disclosing information that would help permit the public to determine whether a particular company has a solid customer base and the potential for long-term economic survival. Customers may be significantly inconvenienced by signing up with a service provider who promptly goes out of business.

In the present case, the nonconfidential records show that Powersource Corporation's customer base reverted to utility distribution companies in the summer of 2001, and that Powersource no longer has any California customers. The absence of easily available information regarding the number of Powersource Corporation's actual California

² Supplemental Direct Access Implementation Activity Reports filed by Southern California Edison, Pacific Gas & Electric and San Diego Gas and Electric concerning Powersource Corporation were provided for the following months and years: October 1999, November 1999, December 1999, January 2000, February 2000, March 2000, April 2000, May 2000, July 2000, September 2000, October 2000, November 2000, December 2000, January 2001, February 2001, March 2001, April 2001, May 2001, June 2001, July 2001, and August 2001.

customer accounts may have contributed to Powersource Corporation's ability to defraud investors, if the US DOJ allegations are correct.

DISCUSSION:

The subpoenaed direct access service request reports are "public records" as defined by the California Public Records Act (PRA). (Government Code § 6250 et seq.) The PRA, and discovery laws, favor disclosure of public records. A justification for withholding a public record in response to a PRA request must be found either among the specified exemptions listed in the Act, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure. In response to a subpoena for Commission records, a justification for withholding records must be based upon a privilege, since PRA exemptions have no impact on discovery. (Government Code § 6260.) Commission decisions regarding disclosure of public records must be consistent with the PRA and relevant discovery law.

There is no statutory prohibition against the Commission's authorization for the disclosure of the portions of the utility direct access request reports concerning Powersource Corporation. Public Utilities Code § 394.4 (a) provides that customer information shall be confidential unless the customer consents in writing, but this limitation covers customer specific billing, credit, or usage information, and does not cover generic information regarding the usage, load shape, or other general characteristics of a group or rate classification, unless the release of that information would reveal customer specific information because of the size of the group, rate class, or nature of the information. Here, the report information concerning the number of Powersource Corporation customer accounts in broad classes such as residential, commercial, or industrial, is of a generic, rather than specific, nature, and is thus not covered by the § 394.4 (a) disclosure limitations.

Evidence Code § 1040 provides public agencies with a privilege to refrain from disclosing official information, defined as information acquired in confidence by a public employee during the course of his or her duty, and not open, or officially disclosed, to the public prior to the time the claim of privilege is made, in two situations: 1) where disclosure is prohibited by an act of Congress or a California statute (§ 1040 (b)(1)); or 2) where the disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice (§ 1040 (b)(2)).

As noted earlier, there is no statutory prohibition against the Commission's disclosure of the number of Powersource Corporation direct access service requests identified in the direct access service request reports filed with the Commission by San Diego Gas & Electric Company, Pacific Gas and Electric Company, and Southern California Edison. Thus, the absolute official information privilege in Evidence Code § 1040 (b)(1) does not apply.

The interests of justice clearly favor cooperation with the US DOJ and the disclosure of records essential to the resolution of the federal government's investor fraud litigation against Powersource. Thus, the conditional official information privilege in Evidence Code § 1040 (b)(2) does not apply.

Therefore we recommend that the Commission exercise its discretion under Public Utilities Code § 583 to authorize the US DOJ to disclose confidential records concerning Powersource Corporation. A draft resolution is attached.

The US DOJ may subpoena the appearance of an Energy Division employee familiar with the direct access program. If this occurs, this staff person will be able to explain at trial the meaning and significance of the direct access records.

The Draft Resolution of the Legal Division in this matter was mailed to the parties in interest on November 10, 2003, in accordance with PU Code § 311(g). Because of the need for immediate action by the Commission in order to authorize disclosure and use of the subpoenaed records concerning Powersource Corporation at a trial scheduled for December 1, 2003, the Commission waived the standard period for notice and comment. Rule 77.7 (f) authorizes reduction or waiver of the period for public review and comment regarding draft decisions in an unforeseen emergency situation (see Rule 81) or where the Commission determines public necessity requires reduction or waiver of the 30-day period for public review and comment. (Rule 77.7 (f)(9).) Rule 81 defines "unforeseen emergency situation" as "a matter that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda." Examples include: (1) requests for relief based on extraordinary conditions in which time is of the essence; (2) deadlines for Commission action imposed by legislative bodies, courts, other administrative bodies or tribunals, the office of the Governor, or a legislator; and (3) unusual matters that cannot be disposed of by normal procedures if the duties of the Commission are to be fulfilled. (Rule 81(f), (g) and (h).)

As required by Government Code § 11125.3(a)(2) and Rule 79 of the Commission's Rules of Practice and Procedure, two thirds of the Commissioners voted to have this item added to the agenda for the Commission meeting scheduled for November 13, 2003.

FINDINGS OF FACT

1. The information in the subpoenaed records is relevant to litigation concerning the United States Department of Justice Consumer Litigation Division allegations of investor fraud and/or misrepresentation by Powersource Corporation.
2. The Commission's records may be essential for the effective resolution of the federal litigation.

3. The public interest favors disclosure of the subpoenaed confidential records concerning Powersource Corporation.
4. Public necessity requires reduction or waiver of the 30-day period for public review and comment, since the litigation for which the Powersource information is needed commences on December 1, 2003, prior to the date by which the Commission could normally act on the Department of Justice request for authorization to disclose that information.
5. An unforeseen emergency situation as defined by Rule 81 of the Commission's Rules of Practice and Procedure exists, since the need for disclosure of the subpoenaed confidential records concerning Powersource Corporation at trial commencing December 1, 2003 requires action by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda. Time is of the essence, there is a deadline for Commission action imposed by a court, and the need to authorize disclosure prior to December 1, 2003 is an unusual matter that cannot be disposed of by normal procedures if the duties of the Commission are to be fulfilled.
6. As required by Government Code § 11125.3(a)(2) and Rule 79 of the Commission's Rules of Practice and Procedure, two thirds of the Commissioners voted to have this item added to the agenda for the Commission meeting scheduled for November 13, 2003.

CONCLUSIONS OF LAW

1. The material in the requested report are public records as defined by Government Code § 6250 et seq.
2. The general policy of the California Public Records Act and discovery laws favor disclosure of records.
3. Justification for withholding a public record in response to a subpoena or other discovery procedure must be based upon a privilege against disclosure.
4. The Commission should exercise its discretion under Public Utilities Code § 583 to authorize disclosure of confidential records concerning a defunct ESP, Powersource Corporation.
5. Public Utilities Code § 583 does not limit the Commission's disclosure of records.
6. Rule 77.7 (f) of the Commission's Rules of Practices and Procedure authorizes reduction or waiver of the period for public review and comment regarding draft

decisions in an unforeseen emergency situation (see Rule 81) or where the Commission determines public necessity requires reduction or waiver of the 30-day period for public review and comment. (Rule 77.7 (f)(9)).

ORDER

1. The request for authorization to disclose confidential Commission records concerning Powersource Corporation in litigation alleging investor fraud and/or misrepresentation by Powersource Corporation is granted.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the Public Utilities Commission during its regular meeting of November 13, 2003 the following Commissioners approved it:

WILLIAM AHERN
Executive Director

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
SUSAN P. KENNEDY
Commissioners

Commissioner Geoffrey F. Brown, being
necessarily absent, did not participate.